SUPREME COURT, U. S.
FILED
AUG 29 1978
MICHAEL RODAK, JR., CLERK

78-343

In The

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 894/77

JOHN L. GRADY et al., and FATIMA GRADY,

*Appellants,*

*— v —*

RODERICK A. McLEAN, M.D.,

*Appellee.*

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

## JURISDICTIONAL STATEMENT

JOHN L. GRADY
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DATE: July 25, 1978.

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— *v* —

RODERICK A. McLEAN, M.D.,

*Appellee.*

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ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

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## JURISDICTIONAL STATEMENT

Appellants appeal from judgement of New York State Court of Appeals, entered on June 13, 1978, setting aside, and refusing to exercise their authority on appeal involving a Statute of the U. S. Constitution, and Statute of New York State Law, on grounds, that the order appealed from is not final within the meaning of the Constitution. We, the appellants, submit this statement to show, that the Supreme Court of the United States has Jurisdiction of the appeal, and that a substantial question is presented.

## OPINIONS BELOW

The opinion of the State Court of Appeals is reported in its judgement. The opinion of the Supreme Court of New York's Appellate Division, Fourth Department was not given on its Affirmation of order in question of appeal. Any opinions of Trial Term Court is annexed in the Appendix, and order appealed from is herein annexed as Appendix A.

## JURISDICTION

This suit is brought pursuant to Federal Statutes: Article III, Section 2.; Article IV, Section 2., Amendments 5, and 14. The Judgement of the State Court of Appeals was entered on June 13, 1978, and notice of appeal was filed in that Court on June 6, 1978. The Jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28 United States Code, Sections 1257; 1292; 2283; 1252; 1254; 1651(a); 1331 et seq.,; and Title 42 United States Code 1983; and State Statutory Law CPLR 5601 (a) (d). The following decisions sustain the jurisdiction of the Court:

Roche v. Evaportated Milk Ass'n, 319 U. S. 21, 26, 63 S. Ct. 938 L. Ed. 1185;
cf. Maryland v. Soper, 270 U. S. 9, 29-30 46 S. Ct. 185, 189. 70 L. Ed. 449;
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Carondelet Canal and Nav. Co. v. Louisiana, 1914, 34 S. Ct. 627, 233 U. S. 326, 58 L. 1001.;
Wheat. 264, 375-6 Quarterly Session Ct. for Borough of Norfolk, Va.;
Wood v. Chesborough, 228;
Williams v. Kaiser, 478;



Nielson v. Lagow, 12 How. 98, 110;
Dixon v. Duffy, 343 U. S. 395;
Cohen v. Beneficial Loan, 337 U. S. 541;
Gospel Army v. City of L. A., 1947, 67 S. Ct. 1428, 1430, 331 U. S. 543, 547, 91 L. Ed. 1662;
Cox Broadcasting Corp. v. Cohen, 43 L. Ed. 328, 1975;
Parker v. L. A. County, 338 U. S. 327, 1949;
Cole v. Violette, 1943, 63 S. Ct. 1204, 319 U. S. 581, 87 L. Ed. 1519;
Mitchum v. Foster, 407 U. S. 225, 1972;
Damico v. Calif. 389 U. S. 416, 1967;
Doctrine Exparte Young, 209 U. S. 132, 1908.

The validity of the U.S. Statute, and New York State Statute involved are: Art. III, Sec.2 Par.1, see Appendix page A-3; Art.IV, Clause 2. Verbatum. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. Amendment 5, recited later, Amendment 14, see in Appendix exhibits last page.

## QUESTIONS PRESENTED

Federal Question presented as excess in abuse of jurisdiction, fairly comprises all federal issue matter affecting State Appellate Court judgement, on trial Term Order dated 7/21/77. Federal issue was initially raised at trial on 6/27/77. Show Cause Order on exparte motion was served by defendant on 6/1/77, is retained by Judge one at hearing on 6/6/77 for arbitration, and have not been returned to appellants as yet.

Exparte order dated 6/13/77, was granted following entry of Plaintiff's Affidavit of Default on 6/7/77.

Consequently federal issue was raised by appellant's pleadings dated 6/7/77; 6/17/77; 6/20/77; 6/23/77, returnable on 6/27/77, charged as error, where no notice was given on order dated 6/13/77, and since defect in power to grant order dated 6/13/77, was then charged, review necessitates presentation of every act of court charged as error, even rulings on facts of non-federal issues, that are claimed as excess in abuse of court's jurisdiction in this case.

Where defect as excess in abuse of Trial Term's power to grant order dated 7/21/77, state's Appellate Court's Affirmation amounts to rejection of plaintiff's rights under federal law, less review of previous order affecting judgement. See Appellant's brief page 18, & reply brief page 4, Point III, to state Appellate Court, also appeal dated 7/18/77, & appeal dated 4/20/78, page 1, par. 3. Where complaint was verified pursuant to state law, and defendant in avoidance of state Statute CPLR 3021(a), served his original answer timely, but unverified accompanied by statement that the verified answer would soon be served, was that a default in verification? and where superseding answer verified came too late to be within statutory limitation of time, was defendant in default?

Pursuant to State Supreme Court Calendar Rule 1024.4(b), was it excess in abuse for temporary restraining order dated 6/13/77, to continue in effect beyond end of term at which it was made?

Where at trial Term judge admitted erroneous evidence, upon which judgement rests, was an act in excess of abuse in jurisdiction, and should judgement be reversed on federal question grounds?



Where judge two at trial directed plaintiffs to await judge one's decision on plaintiff's motion to vacate order dated 6/13/77 involving a default, but during same interim between 6/6/77 and 6/27/77 and prior to return of plaintiff's papers from judge one, and prior to judge two's decision which passed any appeal time. But where judge two after passing any appeal time, simultaneously granted order dated 7/21/77 directing a disclosure before trial. Was such excess in abuse of jurisdiction?

Where judge one's order was made nunc pro tunc, but lacked any of the essential components for adequate jurisdiction, stating as a fact that which was not previously a fact. Was superseding order dated 8/8/77 valid under such facts of law?

Where plaintiffs were not afforded procedural due process of proper notice, or fair opportunity to be heard upon default entry by assignment of error to vacate (set aside) order dated 6/13/77. But contrary to law plaintiff's default entry was set aside, less good cause shown by defendant on affidavit in record. Did excess in abuse of jurisdiction result from such denial?

Where federal question evidence took on significant subject matter as, presentation at trial of documentary nature, against the CIA and FBI federal agencies, claimed as covert activities in perpetration with doctors and medical authorities, against plaintiffs. Was such, excess in abuse of jurisdiction, for trial court to invalidate plaintiff's motion for protective order, where no adequate state grounds could possibly support judgement, not withstanding that the order itself on its face, was jurisdictionally defective in substance.

Where defense attorney designed order dated 10/5/77, for settlement of the Record that was before the court at trial on 6/27/77, but deliberately excluded material

federal question evidence, such as, exhibits given to judge by plaintiffs at trial, which he carried home to study for his decision, where the exhibits revealed involvement of federal agencies, evidence given in support of a protective order. Was such actions excess in abuse of court's jurisdiction? and where judge put his signature to that order, should order be reversed with possible penal sanctions against the attorney?

Where federal question arises, relative to plaintiff's rights to personally prosecute their own cause, after two years and five months, where defendant was in hope for some technical error on the part of plaintiffs, whereby plaintiffs would lose their cause for relief. Thereupon, this question is herein made part of this statement and appeal, if needed, may be used for further review or rehearing.

## STATEMENT

This is an exceptional!! case due to claimed atrocities, sought to be reviewed, but denied, thus far. By pleadings, exceptions, and assignment of error, Trial Term Court order dated 7/21/77, passed over federal issues by its excess in abuse of its jurisdiction, as judicial disgrace, and usurpation of power. Exceptional to the Finality Rules of both Federal and State Statutory grounds. CPLR 5601(a) (d), and other decisions of Case Law, supra. Exceptional for immediate and direct appeal, where appellants have been injured physically, economically, and now threatened under federal statute, by irreparable injury, from delay of the federal question hearing, such as, a dismissal with prejudice, where state court claims to have decided against the federal claim, but remands case for retrial on merits, where if plaintiffs lose on other grounds, state rules would not permit raising federal claim for review, or where plaintiffs win retrial on other grounds,



federal claim would be moot, or where post-poning review pending outcome of further state court proceedings, would seriously erode federal policy leaving unanswered federal claim, or where federal claimed is ruled invalid, at pleading stage which pre-ordains the outcome of any further proceedings. No further proceedings in state court can alter or modify order in plaintiffs favor. Parker v. L. A. County, 338 U. S. 327, 1949.

Where default was entered, defendant had no further right or standing to contest the factual allegations in plaintiff's claim for relief, hence forth, no material and necessary issue existed adequately, order dated 7/21/77, striking plaintiff's case from trial calendar, where no meritorious defense was shown, and where previous affecting order 6/13/77 was shown to be void. Where record did not show an affidavit of meritorious defense, after plaintiffs claimed prejudice by delay, from trial court's refusal to vacate (set aside) order made previously dated 6/13/77, excess in abuse is shown by assignment of error. Please see State Court of Appeal's Brief of Plaintiffs-Appellants, appendix exhibits pages A-10, A-10b Par. 10., see in same record of exhibits pages A-10a, b, c; Carribean Produce Exchange v. Caribe Hydro-Trailer Inc., D. C. Puerto Rico 1974, 65 F. R. D. 46.; FRCP 60(b); CCP Sec. 663(a); FRCP 59(e); CCP Sec. 473.

Order dated 7/21/77 is defective in stating as a fact that which was not previously a fact, that plaintiffs had been notified under CPLR 3121 for a physical examination. However, no order pursuant to CPLR 3132 was served on plaintiffs for a physical examination of Mrs. Fatima Grady prior to order dated 7/21/77. Order dated 7/21/77 was cleverly drawn by the defendant's attorney, which is repugnant to Judge two's memorandum decision dated 7/14/77, of that decision, see

page 2, Paragraph 4. Also see in record from State Court of Appeals pages 6 and 7. Therefore, order dated 7/21/77 is defective in recording that it was upon the Hon. Edward F. McLaughlin's memorandum decision dated 7/14/77, that order dated 7/21/77 was made, for such reference itself tells that it was that decision, that had recorded, that an order pursuant to CPLR 3121 had been served on plaintiffs. Please see in Record from State Court of Appeals, page 6, and 7, see state court reply brief of appellants, page 3, point III.

Where service was not made by notice of order dated 6/13/77 brought before trial court as assignment of error, that was made nunc pro tunc by order dated 8/8/77, court did not have power of jurisdiction to grant either order, for neither was made on notification, and where order dated 8/8/77 was not entered until 8/11/77 in the record, past any appeal time for previous order dated 6/13/77. But exceptions in plaintiff's appeal dated 7/18/77, all subsequent non-final orders was included. See notice of appeal dated 7/18/77, in the certified record. Also see in State Court of Appeals Brief of Appellants exhibits page A-10b Par. 10.

It was improvident exercise in discretion for Judge two at trial, to set aside plaintiff's default affidavit filed on 6/7/77, and then to direct plaintiffs to await Judge one's decision to vacate order dated 6/13/77 involving a default. See Appendix Exhibits. It was also excess in abuse of court's jurisdiction, for Judge two, to direct plaintiffs to await Judge one's decision, and before that decision arrived, which was by order dated 8/8/77 better than one month later, and simultaneously to make an order dated 7/21/77 striking plaintiff's case from the trial calendar, in order for an examination before trial, after one was given on



cross motion by the defense as seen in the certified record.

Where void exparte motion order dated 6/13/77, was raised by motion dated 6/23/77, as seen in State Court of Appeals Brief of Appellants exhibits page A-3, and where motion was decided at Term in County Court where venue is laid during period when State Supreme Court Trial and Special Terms were in session in the County, it was in violation of State Court Calendar Rule 1024.4(a) and 1024.18.; also see 1024. (b), in January to June 1977 Supreme Court Trial Term Calendar, Onondaga County.

Where defense attorney deliberately excluded material evidence on settlement of the record to Appellate State Court, submitting order dated 10/5/77 for Judge two's signature, perjury may have been committed. For any error on rulings of admission of evidence during trial constitutes grounds for reversal, where such error had probable effect on State Appellate Court's decision of Affirmation in reliance thereon. See in appellant's record from State Court of Appeals pages 5; 10; 11; 12; Blood v. Colby, 1932, 236 A. D. 537, 260 NYS 233; 39 Utah 617; See in Appendix to this Court, Appeal dated 10/31/77.

Pursuant to Rule 33 Part 8, 2b, no court pursuant to 28 U. S. C. Section 2403, certified to the Attorney General the fact that the constitutionality of such Act of Congress was drawn in question.

All parties required to be served have been served.

Upon grounds as excess in abuse of Court's jurisdiction, where highest Court, State Court of Appeals rejected reviewing on appeal in this case, and where next highest State Appellate Division was mum on its remittitur entered in the Onondaga County Clerk's Office on 7/14/77, and refused to review as requested,

previous orders, affecting the judgement in question dated 7/21/77, yet its decision being unanimous affirmation under its own state statute CPLR 5601(a)(d), was final for further appeal. Then! it becomes incumbent upon this Court, to take complete jurisdiction on the merits, for plenary consideration.

Recital of Amendment 5; No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment of an indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, without due process of Law; nor shall private property be taken for public use, without just compensation.

Where Appellee contends having a vested right to strike plaintiff's case from the trial calendar, to secure a second go round of inspection before trial, and where plaintiff's default affidavit was then standing before the Court at trial, but set aside, where no meritorious defense is shown, was usurpation of power and judicial whim. See Exhibits in appendix, when Judge two after trial returned plaintiff's original pleadings, left with him to study for his decision.

The decision of the State Appellate Division is clearly incorrect, in affirming, less review of previous affecting orders, where order dated 7/21/77, was made on non-federal grounds; CPLR 3101-3121(a); Calendar Rule 1024. 5; Order dated 7/21/77 was defective in substance. Defendant did not comply to Order dated 7/21/77, therefore, rendering preclusion under Court Rule 1024. 25(g), from further disclosure as such. See in brief of appellants exhibits, to State Court of Appeals,



page A-11b, Judge's Memorandum Decision dated 7/14/77, line 5, for grounds upon which order was made. See reply brief to State Appellate Division, page 4, point 3.

Before default may be set aside, party in default must show the Court what defense, if any, he had to action which he is prevented from asserting and statement of meritorious defense exists. Nelson v. Coleman Co., D. C. S. C. 1966, 41 F. R. D. 7.

DATED: July 25, 1978.

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# APPENDIX

**ORDER OF THE COURT OF APPEALS OF THE STATE OF NEW YORK.**

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the thirteenth day of June A. D. 1978

Present, HON. CHARLES D. BREITEL,
Chief Judge, presiding.

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4 Mo. No. 523
John L. and Fatima Grady,
Appellants,
vs.
Roderick A. McLean, M. D.,
Respondent.

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A motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken by the appellants in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, without costs, upon the ground that the order appealed from does not finally determine the action within the meaning of the Constitution.

s/ JOSEPH W. BELLACOSA
Joseph W. Bellacosa
Clerk of the Court